STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2011
V TROY LAVAUGHN JONES, JR., Defendant-Appellant.	No. 292793 Allegan Circuit Court LC No. 08-016032-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V TROY LAVAUGHN JONES, JR., Defendant-Appellant.	No. 292794 Allegan Circuit Court LC No. 08-015991-FH

Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant was charged in LC No. 08-015991-FH with two counts of assault with intent to do great bodily harm less than murder. MCL 750.84. He was separately charged in LC No. 08-016032-FH with witness tampering, contrary to MCL 750.122(7)(b). The cases were consolidated for trial. Following a jury trial, defendant was convicted of the witness tampering charge and one count of assault with intent to do great bodily harm. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to consecutive prison terms of 28 to 72 months for the witness tampering conviction, and 10 to 20 years for the assault conviction. Defendant now appeals as of right in these consolidated appeals. We affirm defendant's convictions, but remand for resentencing.

I. FACTS

Defendant was convicted of assaulting Tanya Rogers during the early morning hours of October 11, 2008, at defendant's house. Defendant was acquitted of a separate assault charge

involving his sister, Debra Jones. The witness tampering conviction arose from defendant's offer to pay Rogers $1,000 for either refusing to testify or for testifying in a specified manner. Defendant now appeals.

II. MOTION FOR NEW TRIAL

Defendant first argues that the trial court abused its discretion when it denied defendant's motion for a new trial. We disagree.

This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when a trial court chooses an outcome that is outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). This Court reviews de novo the legal question whether an attorney-client privilege exists. *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 484; 691 NW2d 50 (2004). This Court also reviews de novo the legal question whether that privilege has been waived. *Leibel v Gen Motors Corp*, 250 Mich App 229, 240; 646 NW2d 179 (2002). A trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). A finding is clearly erroneous when, although there is evidence to support it, this Court, on the whole record, is left with a definite and firm conviction that a mistake was made. *Id*. at 130.

After it was discovered that defendant sent the witness tampering letter on October 28, 2008, jail officials began opening all of defendant's incoming and outgoing mail at the jail, unless it was clearly marked as an attorney communication. The mail was copied and forwarded the Allegan County Sheriff's Department, who in turn forwarded it to the prosecutor. When defendant became aware of this practice, he raised the issue in a pretrial hearing at which he argued that the seizure of his mail for copying and its dissemination violated his constitutional rights. The trial court denied the motion because it concluded that the material was either non-privileged because it was sent through third parties, or privileged, but defendant could not show any prejudice.

After trial, defendant filed a motion for a new trial reiterating his argument regarding the improper seizure and dissemination of his mail, asserting that the prosecution was able to tailor its case based on the information it received in the mail. The trial court denied this motion.

A new trial may be granted for any ground set forth in MCR 2.611(A)(1), on any ground that would support reversal on appeal, or because the verdict resulted in a miscarriage of justice. MCR 6.431(B); *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). On appeal, defendant asserts that the seizure of his legal mail for copying and dissemination, regardless of whether it was contained in an envelope from a third party, constituted an intentional violation of his right to private communication with his attorney, and requires that his convictions be vacated and the charges dismissed with prejudice. He contends that this type of violation is structural in nature and that the trial court erroneously required him to prove prejudice. He alternatively argues that, at a minimum, he is entitled to a new trial at which the Allegan County Prosecutor's Office and the sheriff's department must be disqualified.

Under the United States and Michigan Constitutions, a defendant in a criminal prosecution is entitled to counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. A defendant's right to counsel under the state constitution is generally the same as that guaranteed by the United States Constitution. *People v Reichenbach*, 459 Mich 109, 118; 587 NW2d 1 (1998).[1] Generally, in Michigan, persons incarcerated in jail while awaiting trial are entitled to the protections guaranteed by the Fourth Amendment. *People v Williams*, 118 Mich App 117, 120; 325 NW2d 4 (1982). However, this Court has held that there is no Fourth Amendment violation when an inmate's non-privileged mail is seized and read by jail officials. *Id*. at 121, citing *Stroud v United States*, 251 US 15; 40 S Ct 50; 64 L Ed 103 (1919); see also *People v Oliver*, 63 Mich App 509, 515; 234 NW2d 679 (1975) (jail authorities have a right to open, read, and confiscate inmate mail for internal security reasons).

An inmate's communications with his attorney are afforded special protections. As observed in *People v Waclawski*, 286 Mich App 634, 693-694; 780 NW2d 321 (2009), quoting *Ravary v Reed*, 163 Mich App 447, 453; 415 NW2d 240 (1987):

> "The attorney-client privilege attaches to communications made by a client to his or her attorney acting as a legal adviser and made for the purpose of obtaining legal advice on some right or obligation. *Alderman v The People*, 4 Mich 414, 422 (1857); *Kubiak v Hurr*, 143 Mich App 465, 472-473; 372 NW2d 341 (1985). The purpose of the privilege is to allow a client to confide in his or her attorney secure in the knowledge that the communication will not be disclosed. *Id.*, 473. The privilege is personal to the client, who alone can waive it. *Passmore v Passmore's Estate*, 50 Mich 626, 627; 16 NW 170 (1883)."

The attorney-client privilege includes both the security against publication and the right to control the introduction into evidence of such information or knowledge communicated to or possessed by the attorney. *Leibel*, 250 Mich App at 240.

However, the protection is not absolute. "Once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears." *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 658; 564 NW2d 922 (1997). For instance, in *People v Compeau*, 244 Mich App 595, 597-598; 625 NW2d 120 (2001), the Court held that a communication was not privileged where the defendant failed to take reasonable precautions to keep his conversation between himself and his attorney confidential.

We conclude that the trial court properly ruled that some of defendant's mail, which contained copies of defendant's letters to his attorney, was not privileged. The letters were each contained in an envelope sent to defendant from his father, a third party. It is unknown how defendant's father came to possess copies of the letters that defendant wrote to defense counsel, but his possession was purposeful. Defendant's father mailed the copied letters to defendant at

[1] A "compelling reason" must exist to justify finding that the Michigan Constitution affords greater protection than its federal counterpart. *Reichenbach*, 459 Mich at 118-119.

defendant's request. Because defendant allowed the letters to be shared with his father, the communications lost their privileged status. *Leibel*, 250 Mich App at 240 (valid waiver requires intentional, voluntary act); *Compeau*, 244 Mich App at 597-598. Therefore, defendant's Sixth Amendment right to counsel was not affected. Also, the letters' subsequent seizure by jail officials, and any use by the prosecutor if such had been established, did not violate his Fourth Amendment rights. *Williams*, 118 Mich App at 121.

However, two of the letters were clearly privileged legal mail.[2] One was an incoming letter to defendant from defense counsel, in an envelope clearly marked as such. The other was an outgoing multi-page letter also in an envelope clearly marked to defense counsel. Therefore, the opening of this mail was an impermissible intrusion. The critical question is whether the trial court properly required defendant to show that he was prejudiced by these intrusions.[3]

In *People v Iaconnelli (On Rehearing)*, 116 Mich App 176, 177; 321 NW2d 684 (1982), this Court reversed its previous decision granting the defendant a new trial on the ground that his Sixth Amendment right to counsel was impermissibly invaded. This Court found no prejudice to the defendant where there was a lack of evidence showing that any trial strategy was communicated to the prosecution. *Id.* The prosecution had questioned a codefendant, who previously had the same attorney as the defendant, regarding defense strategies before he became a prosecution witness. *People v Iaconnelli*, 112 Mich App 725, 737; 317 NW2d 540 (1982).

Therefore, we conclude that Michigan courts favor requiring a finding of prejudice before an intentional governmental intrusion will be determined to be a Sixth Amendment violation. The existing record demonstrates that the trial court did not clearly err in its factual finding that the prosecutor did not use any information to defendant's disadvantage, i.e., that defendant suffered no prejudice. See *Dendel*, 481 Mich at 114. Accordingly, the trial court did not abuse its discretion in its ultimate decision to deny defendant's motion for new trial. See *Miller*, 482 Mich at 544.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that defense counsel was ineffective for failing to object to portions of Rogers's testimony or for failing to object to CJI2d 4.5(2) as read. We disagree.

Defendant did not raise either of his claims in his motion for a new trial. Therefore, this Court's review of those claims is limited to mistakes apparent from the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

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[2] The remaining exhibit was a letter from the Judicial Tenure Commission. Defendant does not argue that this letter constituted legal mail entitled to special protection. *Sallier v Brooks*, 343 F3d 868 (CA 6, 2003) (discussing distinctions between legal and non-legal mail).

[3] Although defendant asserts that there was a jail policy pursuant to which all of his mail, including legal mail, was to be opened, copied, and provided to the sheriff's department, the existence and validity of the jail's policy itself is not at issue on appeal.

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *Dendel*, 481 Mich at 124. A court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A. ROGERS' TESTIMONY

Defendant asserts that certain testimony by Rogers was irrelevant and unfairly prejudicial. Generally, all relevant evidence is admissible. MRE 402; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Yost*, 278 Mich App 355. Thus, relevant evidence must have both material and probative value. The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern whether evidence is relevant. *Yost*, 278 Mich App 403. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010). Unfair prejudice exists when there is a tendency that marginally probative evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id*. Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion, and whether the fact can be proved another way with fewer harmful collateral effects. People v Oliphant, 399 Mich 472, 490; 250 NW2d 443 (1976).

Defendant challenges Rogers's testimony regarding a suicide attempt and her changed lifestyle since the assault. In his opening statement, defense counsel asserted that Rogers did not show up for the first or second scheduled preliminary examinations because she was being forced to testify. The prosecutor responded by eliciting from Rogers on direct examination that she was not present for the first preliminary examination because of a suicide attempt and that she did appear for the second preliminary examination, but did not testify. She stated that she attempted suicide because she did not want to testify, which was a result of her fear of defendant. Defense counsel also attacked Rogers's credibility by highlighting that her account of the assaults had changed. The prosecutor asked Rogers if the incident had changed her life in any way. Rogers stated that she had become engaged, moved out of her mother's home, attended church, and quit drinking alcohol and using drugs.

Rogers's testimony was relevant in light of defense counsel's opening statement. The

credibility of witnesses is always a material issue. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). The testimony regarding her suicide attempt explained why she did not appear for the first preliminary examination. Further, her testimony explaining how her life had changed were factors that were relevant to her credibility. She no longer led the lifestyle she was living when the incident occurred. Therefore, none of the testimony was unfairly prejudicial and there did not exist a tendency for the jury to give marginally probative evidence undue weight. Accordingly, because the testimony was admissible, defense counsel was not ineffective for failing to object. *People v Unger*, 278 Mich App 210, 255; 749 NW2d 272 (2008).

Also, we disagree with defendant's assertion that Rogers's testimony regarding her fear of him unfairly attacked his character. Rogers simply explained why she did not want to testify. Factors influencing her motive to testify were relevant to her credibility and also to rebut defendant's contention that her reluctance to testify was somehow related to feeling forced to testify. Thus, defense counsel was not ineffective for failing to object.

B. JURY INSTRUCTIONS

Defendant also argues that defense counsel should have objected to CJI2d 4.5(2), as read. A trial court's jury instructions are generally adequate if "they fairly present the issues for trial and sufficiently protected the defendant's rights." *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). The trial court instructed the jury as follows:

> If you believe that a witness previously made a statement inconsistent with his or her testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.
>
> Evidence has been offered that Debra Jones in this case previously made, to Deputy Johanson, statements inconsistent with her testimony at this trial. You may consider such earlier statements in deciding whether the testimony at this trial was truthful and in determining the facts of the case.

The instruction mirrored CJI2d 4.5(1) and (2), except that subsection (2) was tailored specifically to Debra Jones's prior statements to Deputy Johanson.

Defendant asserts that omitting Rogers from CJI2d 4.5(2) was unfair because both Rogers and Debra made inconsistent statements. However, defendant fails to recognize the differences between the two subsections. Subsection (1) instructs the jury that a prior inconsistent statement can be used as impeachment evidence only. The first paragraph of the trial court's instruction was not limited to Debra, but rather applied to a prior inconsistent statement of any witness. Conversely, subsection (2) instructs that a particular prior inconsistent statement can be considered as both impeachment and substantive evidence. See use note to CJI2d 4.5.

Defense counsel could have requested that CJI2d 4.5(2) also be read to apply to Rogers, but not in regard to all of the prior statements he cites. Inconsistent prior statements made under oath and subject to the penalty of perjury are not hearsay, MRE 801(d)(1)(A), and thus properly

can be used as substantive evidence. See *People v Malone*, 445 Mich 369, 378; 518 NW2d 418 (1994) (statements that are not hearsay under MRE 801(d)(1) may be used as substantive evidence). Inconsistency includes not only diametrically opposed answers, but also evasive answers, inability to recall, silence, or changes of position. *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999), overruled on other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006). Defense counsel referenced Rogers's inconsistent preliminary examination testimony on several occasions. Because these prior inconsistent statements were not hearsay, they could have been considered as substantive evidence. Therefore, CJI2d 4.5(2) was applicable to Rogers's statements in these instances.

However, Rogers admitted that her first prior statement was a lie, and she explained that the second was the result of her misunderstanding the question. The testimony pertained to her drug use on the night of the incident and her presence during the physical altercation between Debra and defendant, respectively.[4] Only in the third instance did Rogers not recall making the prior statement, which was that she saw defendant with a knife that night. However, jury consideration of this prior statement as substantive evidence would not have been favorable to defendant. Given Rogers's testimony, it was not objectively unreasonable for defense counsel to forego requesting that the jury consider Rogers's non-hearsay prior inconsistent statements as substantive evidence. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defense counsel's goal appears to have been impeachment, which CJI2d 4.5(1) addressed. We disagree with defendant's contention that by not including Rogers in CJI2d 4.5(2), the trial court somehow conveyed to the jury that Rogers's testimony was consistent and that she was credible. In addition to giving CJI2d 4.5(1), the trial court instructed the jury that it was the sole determiner of the facts of the case, which included the responsibility to determine "whether you believe what each of the witnesses said," and the court provided several factors for the jury to consider in assessing witness credibility. The trial court also explicitly stated that its instructions were not evidence, that it was not to draw any conclusions about its opinion, and that it was not to consider any opinion it believed the court may have expressed.

Further, through vigorous cross-examination and closing argument, defense counsel highlighted Rogers's prior inconsistent statements and otherwise impugned her credibility. Thus, there is no merit to defendant's contention that the omission of Rogers from CJI2d 4.5(2) affected the outcome of the trial. No reasonable correlation can be made between CJI2d 4.5(2) as read, which only applied to a specific set of statements, and the jury's acquittal of the assault with intent to do great bodily harm charge with respect to Debra. Accordingly, we conclude that defense counsel was not ineffective for failing to object to the trial court's jury instruction concerning the use of prior inconsistent statements.

[4] Rogers testified at the preliminary examination that she was present during the altercation. She clarified at trial that she was present in the house during the entire incident, but not necessarily in the same room as defendant and Debra.

IV. SENTENCE CALCULATION

Next, defendant argues that the trial court improperly calculated his sentence. We agree. We conclude that the trial court did not err in scoring OV 9 and OV 19 at ten points each. The trial court erroneously scored OV 10 at five points. It also erroneously scored OV 13 before scoring OV 12. Five points should have been scored for OV 12 and, based on the existing record, the trial court's score of 25 points for OV 13 is not supported. The scoring errors require resentencing.

When scoring the sentencing guidelines, a sentencing court has discretion in determining the number of points to be scored provided there is evidence of record that adequately supports a particular score. *Waclawski*, 286 Mich App at 680. The trial court's scoring of offense variables is determined by reference to the record, using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Questions involving the interpretation and application of the statutory sentencing guidelines are reviewed de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). In construing the sentencing guidelines, this Court must discern and give effect to the Legislature's intent. Statutory language should be given its plain meaning and construed in context. *People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002). Unpreserved claims relating to the scoring of an offense variable are reviewed for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

The trial court scored the sentencing guidelines for defendant's assault conviction. Defendant received a total offense variable score of 60 points, placing him at OV Level V (50 to 74 points), and his prior record variable score placed him at PRV Level E. Thus, as a fourth habitual offender, defendant's sentencing guidelines range was 34 to 134 months on the applicable sentencing grid. MCL 777.21(3)(c); MCL 777.65.

A. APPLICABILITY OF *McGRAW*

Defendant's arguments for OV 9 and OV 19 are based on *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009), in which our Supreme Court held that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." Thus, "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id.* at 122. However, our Supreme Court clarified in *People v Mushatt*, 486 Mich 934; 782 NW2d 202 (2010), "that the retroactive effect of *McGraw* is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved." Although this case was pending on appeal when *McGraw* was decided, defendant did not preserve his scoring challenges to OV 9 and OV 19. Therefore, *McGraw* does not control this case.

A. OV 9

Points are scored under OV 9 depending on the number of victims. OV 9 instructs that a court is to "[c]ount each person who was placed in danger of physical injury or loss of life or

property as a victim." MCL 777.39(2)(a). Ten points are scored if there are two to nine victims. MCL 777.39(1)(c). In scoring the guidelines for defendant's assault on Rogers, the trial court determined by a preponderance of the evidence that defendant also assaulted Debra and did so on the same evening and in the same location as Rogers. Thus, it found that ten points was justified. A trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence. *People v Ewing (After Remand)*, 435 Mich 443, 446; 458 NW2d 880 (1990) (BRICKLEY, J.); *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995). Also, a trial court's scoring of the sentencing guidelines need not be consistent with the jury verdict. *People Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003). Thus, the trial court properly considered the evidence as it related to defendant assaulting Debra.

Rogers testified that defendant was in a blind fury during the melee and used force beyond that necessary to repel Debra's attack by choking her to near unconsciousness. According to defendant, Debra was present in the kitchen while his attention was turned to Rogers. Regardless of whether defendant actually assaulted Debra, there was sufficient evidence to support the trial court's finding that Debra was also in danger of physical injury during defendant's assault on Rogers. Therefore, the trial court did not plainly err in scoring OV 9 at ten points.

B. OV 10

OV 10 provides that five points should be scored when "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). The mere existence of one or more of these factors does not equate automatically to victim vulnerability. MCL 777.40(2). "'Exploit' means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "'Vulnerability' means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). The trial court found that five points was proper because defendant exploited the difference in size and strength between himself and Rogers, and also exploited her intoxication from alcohol or drugs. Rogers testified that she weighed 115 pounds at the time of the assault. Defendant testified that he was six feet, two inches tall and weighed 180 pounds at the time of the assault.

Defendant does not dispute that there was a physical size and strength difference between himself and Rogers, or that Rogers was intoxicated to some level. Rather, he asserts that there was no evidence that he exploited any of these vulnerabilities. The evidence indicated that defendant was highly intoxicated and enraged. He attacked Rogers after she hit him, turning his attention away from Debra, and continued the assault until Debra left the house. The trial testimony does not support finding that defendant manipulated Rogers for selfish or unethical purposes. "Every word or phrase of a statute should be accorded its plain and ordinary meaning, but if the legislative intent cannot be determined from the statute itself, dictionary definitions may be consulted." *People v Althoff*, 280 Mich App 524, 535; 760 NW2d 764 (2008). "Manipulate" is defined as "to manage or influence skillfully and often unfairly;" "to handle or use, esp. with skill;" "to adapt or change . . . to suit one's purpose or advantage;" or "to examine or treat by skillful use of the hands." *Random House Webster's College Dictionary* (1997), p

799. The definition connotes some level of skill or purpose. We conclude that defendant did not, and probably could not, think clearly and act purposefully enough to conclude that he manipulated any victim's vulnerability. He did not choose to attack Rogers based on his size or strength advantage or her intoxication, which testimony indicated was relatively low compared to defendant's level. Therefore, the trial court erred in scoring five points for OV 10.

C. OV 13

OV 13 provides that 25 points should be scored where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The probation officer in the presentence report recommended scoring OV 13 at 25 points. The prosecutor had asked that OV 12 be scored at five points, but agreed at sentencing that the proposed scoring of OV 13 was proper. Defendant stated that he could not object to scoring OV 12, but he objected to the scoring of OV 13. The trial court found that 25 points was proper for OV 13 based on the assaults of Debra and Rogers, and a prior assault of Beverly Jones in 2004.

Defendant argues that there was no pattern of criminal activity to support a score for OV 13 and that OV 12 should have been scored at five points instead. OV 12 provides that five points should be scored where "[o]ne contemporaneous felonious criminal act involving a crime against a person was committed." MCL 777.42(1)(d). To be contemporaneous, the act must have "occurred within 24 hours of the sentencing offense" and "has not and will not result in a separate conviction." MCL 777.42(2)(a). In *People v Bemer*, 286 Mich App 26, 35; 777 NW2d 464 (2009), this Court held that all pertinent conduct must first be scored under OV 12 before it may be considered under OV 13.

In this case, five points was clearly proper for OV 12 because there was sufficient evidence to find that Debra was contemporaneously assaulted with Rogers. OV 13 instructs that conduct scored in OV 11 or OV 12 is not to be used in scoring OV 13 "[e]xcept for offenses related to membership in an organized criminal group or that are gang-related." MCL 777.43(2)(c). Thus, Debra's assault should have been scored under OV 12 and could not further be used to support a score under OV 13. Therefore, the trial court erred in relying on Debra's assault to score OV 13 before scoring OV 12.

The record indicates that defendant has an extensive criminal record, but few felony convictions. The only other offense raised at sentencing with respect to OV 13 was an alleged assault on Angela Gamez of which defendant was acquitted. The trial court did not determine whether this offense could be used to score OV 13. Thus, the record does not support a score of 25 points for OV 13 independent of Debra's assault. Therefore, the trial court erred in scoring OV 13 at 25 points and not scoring OV 12 at five points. Independent of any other scoring errors, a net reduction of 20 points reduces defendant's total OV score to 40 points, placing him in OV Level IV instead of OV Level V, and reducing his sentencing guidelines range to 29 to 114 months as a fourth habitual offender. Because the scoring error affects defendant's sentencing guidelines range, defendant is entitled to resentencing. However, at resentencing, additional evidence may be presented to support scoring OV 13. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

D. OV 19

OV 19 provides that ten points should be scored where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Interfering or attempting to interfere with the administration of justice is broadly interpreted when assessing OV 19. *People v Barbee*, 470 Mich 283, 286-287; 681 NW2d 348 (2004). Any acts by a defendant that interfere or attempt to interfere with the judicial process or law enforcement officers and their investigation of a crime may support a score for OV 19. *Id*. at 287-288. Defendant's attempt to bribe Rogers to prevent her from testifying at his preliminary examination constitutes an "attempt to interfere with the administration of justice." Therefore, ten points for OV 19 was proper. Accordingly, defense counsel was not ineffective for failing to object to the scoring of this variable. *Unger*, 278 Mich App at 255.

In sum, we conclude that the trial court did not err in scoring OV 9 or OV 19, but that scoring errors for OV 10, OV 12, and OV 13 require resentencing.

V. IMPEACHMENT PURSUANT TO MRE 509

Next, defendant argues that his constitutional rights were violated when he was impeached with invalid retail fraud convictions and that defense counsel was ineffective for failing to investigate defendant's claim that he was not represented by counsel and was only convicted of one count of retail fraud. We disagree.

Because defendant's appellate challenge to the admissibility of the convictions is based on a different ground, which was not raised below, this issue is unpreserved. *Kimble*, 470 Mich at 312. Defendant did not raise his corresponding ineffective assistance of counsel claim in his motion for a new trial. Therefore, this Court's review is limited to mistakes apparent from the record. *Jordan*, 275 Mich App at 667. This Court reviews unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

At trial, the prosecutor was allowed to impeach defendant with one of his three 2007 misdemeanor retail fraud convictions pursuant to MRE 609. On direct examination, defendant testified that he was convicted of only one count of retail fraud. Therefore, the prosecutor impeached defendant with evidence that he was convicted of three counts. On appeal, defendant now contends that the convictions were obtained in violation of his right to counsel. He attaches to his Standard 4 brief numerous documents relating to these convictions in support of his position.

In *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994), in the context of determining a defendant's habitual offender status, our Supreme Court held that a defendant who collaterally challenges an antecedent conviction on the basis that he was not represented by counsel bears the initial burden of establishing that the conviction was obtained without counsel. He can satisfy this initial burden by presenting "prima facie proof" that a previous conviction was obtained without counsel such as "a docket entry" or "a transcript" or by presenting evidence that the defendant requested such records and the sentencing court "either (a) failed to reply to the request, or (b) refused to furnish copies of the records[.]" *Id.*

We conclude that there is no plain (i.e., clear or obvious) error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The documents indicate that defendant pleaded guilty to three counts of retail fraud after waiving his right to counsel. Defendant's annotations on the various documents mirror his sentiments in his motion to withdraw his guilty plea and accompanying affidavit regarding a desire for counsel and not knowingly waiving his right to counsel. However, there is nothing objective in the materials to suggest that defendant was denied his right to counsel or that his waiver was not valid. Also, defendant does not contend that he has requested any records and that his requests have been unanswered or refused. Therefore, defendant has not shown a plain error.

In regard to defendant's ineffective assistance of counsel claim, the documents support defendant's contention that he was not represented by counsel when he entered his guilty plea. Defendant's motion to set aside his guilty plea and accompanying affidavit assert that his waiver of counsel was not valid. However, based on the record before this Court, there is nothing to indicate that defense counsel did not investigate this issue. Defense counsel was aware of the convictions and argued that MRE 609 was not applicable. Thus, defendant has not established the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

VI. REQUEST TO ADJOURN

Next, defendant argues that the district court erred by refusing to adjourn the preliminary examination so that defendant could undergo a forensic examination and that defense counsel was ineffective for failing to pursue an insanity defense despite being aware of defendant's extensive history of mental health issues. We disagree.

This Court generally reviews for an abuse of discretion a trial court's decision whether to grant an adjournment. *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009).

Defendant's first defense counsel requested that the preliminary examination in the assault case be adjourned to allow a psychiatric evaluation of defendant to determine whether he was criminally responsible. The district court refused to adjourn the preliminary examination, which had already been adjourned twice.

In deciding whether to grant an adjournment, a court should consider whether the defendant: (1) asserted a constitutional right; (2) had a legitimate reason for asserting the right; (3) had been negligent; and (4) had requested previous adjournments. *People v Charles O Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). The defendant must also show that he was prejudiced by the court's denial of his motion for an adjournment. *Id.*

In this case, defendant's request for an adjournment was not based on the assertion of a constitutional right, but rather a statutory right to a forensic examination. Further, the preliminary examination had previously been adjourned twice. More significantly, it was not critical that a forensic examination be conducted before the preliminary examination, and defendant was not prejudiced by the district court's decision. The district court's ruling did not prohibit defendant from obtaining a forensic examination before trial or from pursuing an insanity defense under MCL 768.20a. The court only ruled that it would not adjourn the

preliminary examination on the assault charges, which had already been adjourned twice, in order for defendant to have a forensic evaluation. Defendant still could have sought a forensic examination at any time before trial after he was bound over to circuit court. Under these circumstances, the district court did not abuse its discretion in denying defendant's motion for an adjournment, and defendant was not prejudiced by the decision.

VII. UNPRESERVED CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that defense counsel was ineffective for a variety of other reasons, none of which he preserved for appeal. We disagree.

First, defendant asserts that defense counsel was ineffective for failing to object to Rogers's testimony that defendant told her that he stabbed himself to "make it even"[5] with Debra because it was an extremely prejudicial statement in a trial that was a credibility contest. This testimony, which was otherwise admissible pursuant to MRE 801(d)(2)(A), was not irrelevant or unfairly prejudicial. Rogers's testimony was highly probative of defendant's state of mind immediately after the assaults, which was critical given that assault with intent to do great bodily harm is a specific intent crime. *People v Brown*, 267 Mich App 141, 150; 703 NW2d 230 (2005). Thus, there was no a danger that the jury would give undue weight to minimally probative evidence. Therefore, defense counsel was not ineffective for failing to make a meritless objection. *Unger*, 278 Mich App at 255.

Second, defendant asserts that defense counsel was ineffective for failing to obtain documents to prove that Rogers committed perjury, had a violent nature, and for failing to otherwise undermine her credibility. Defendant wanted Rogers's prison record, complete criminal history, and hospital records. However, he does not explain how Rogers perjured herself, how her background reflects a violent nature, or how counsel should have otherwise impeached her with the documentation. Therefore, defendant has not carried his burden of establishing the factual basis for this ineffective assistance of counsel claim. *Hoag*, 460 Mich at 6.

Third, defendant asserts that defense counsel was ineffective for failing to move for a mistrial when it was discovered that the jury could hear what was happening in the courtroom. During a trial recess, the parties discussed which parts of defendant's interview with Lieutenant Matice would be played for the jury. Concerned that the jury might be able to hear parts of the interview played in the courtroom that were to be excised for the jury, the trial court conducted a test at defendant's request. A very brief portion of the interview was played and the bailiff stated that if it was silent in the jury room, "you can more or less make out what's being said." Thus, the trial court discharged the jury for lunch to allow the parties to resolve the evidentiary issue.

A trial court should grant a mistrial only for an irregularity which is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich

[5] Rogers did not testify that defendant stabbed himself to "get even" with Debra as defendant represents.

App 217, 228; 530 NW2d 497 (1995). There is no evidence that the jury actually heard any of the courtroom proceedings. Further, no objectionable material from the interview was played in the courtroom before the jury was discharged. Thus, the record does not support that there were actual grounds for a mistrial. Therefore, defense counsel was not ineffective for failing to make a meritless motion. *Unger*, 278 Mich App at 255.

Fourth, defendant asserts that defense counsel was ineffective for failing to ask for the appointment of an expert to challenge the testimony of Dr. Clint Griffin, the emergency room physician who testified regarding Rogers's and Debra's injuries. Ineffective assistance of counsel will only be found for failure to present a witness when the failure deprived the defendant of a substantial defense, which is one that might have made a difference in the trial's outcome. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). Defendant fails to explain what testimony a defense expert would have refuted or how it could have benefitted him. Therefore, he has failed to carry his burden of establishing this ineffective assistance of counsel claim. *Hoag*, 460 Mich at 6.

Fifth, defendant asserts that defense counsel was ineffective for failing to investigate and potentially present a duress defense along with his self-defense defense. Defense counsel has a duty to investigate and present meritorious defenses. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Defendant does not explain how a duress defense would have been applicable to his case. To the extent he believes his testimony could have supported a duress defense, we disagree because defendant denied that he assaulted either Rogers or Debra with the intent to do great bodily harm. For a duress defense, the burden is on the defense to present "some evidence that the defendant did the act and chose to do so out of a reasonable and actual belief that it was the lesser of two evils." *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003), quoting *People v Lemons*, 454 Mich 234, 249; 562 NW2d 447 (1997). The defense is not applicable where the defendant denies that he committed the prohibited act. *Lemons*, 454 Mich at 249 (defendant denied sexually abusing her children); *McKinney*, 258 Mich App at 164 (defendant denied possessing narcotics). Thus, defendant has failed to establish that he was denied a meritorious defense and, accordingly, this ineffective assistance of counsel claim must fail. *Unger*, 278 Mich App at 255.

VIII. IMPROPER CHARGE

Next, defendant argues that he was improperly charged under MCL 750.122(7)(b) because the underlying offense, assault with intent to do great bodily harm, carries a maximum penalty of ten years. MCL 750.122(7)(b) only applies where the underlying offense's maximum penalty is more than ten years. He also asserts that defense counsel was ineffective for failing to pursue whether defendant was charged under the wrong statute. We disagree.

Defendant did not raise any claim below that he was charged under the wrong statute. At the preliminary examination, defense counsel only mentioned a concern regarding the way the information read because it included reference to "imprisonment for life or any term of years" when the maximum penalty for assault with intent to do great bodily harm is ten years. The trial court stated that the language was "statutory." Defense counsel did not argue that MCL 750.122(7)(b) was inapplicable. Therefore, this claim is unpreserved.

Defendant did not raise his corresponding ineffective assistance of counsel claim in his motion for a new trial. Therefore, this Court's review is limited to mistakes apparent from the record. *Jordan*, 275 Mich App at 667. Unpreserved claims of error are reviewed for plain error affecting substantial rights. *Knox*, 469 Mich at 508.

In *People v Shahideh*, 277 Mich App 111, 115; 743 NW2d 233 (2007), this Court set forth the applicable rules for statutory construction:

> When faced with a question of statutory interpretation, "[w]e begin by construing the language of the statute itself." "Our concern is to ascertain and give effect to the legislative intent as expressed by the plain language of the statute." "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." The Legislature is presumed to have intended the meaning it plainly expressed, and we may not speculate about the probable intent of the Legislature beyond the language expressed in the statute.
>
> When examining a statute, we presume that every word has some meaning. Every word in a statute should be afforded its plain and ordinary meaning. [Citations omitted.]

Defendant was initially charged with two counts of assault with intent to do great bodily harm and was bound over on the same. He was later charged with, and convicted of, witness tampering pursuant to MCL 750.122(1). The penalties for violating this section are prescribed in MCL 750.122(7), which provides:

> A person who violates this section is guilty of a crime as follows:
>
> (a) Except as provided in subdivisions (b) and (c), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.
>
> (b) If the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is *more than 10 years*, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both.
>
> (c) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both. [Emphasis added.]

The witness tampering complaint and informations identified MCL 750.122(7)(b) as the applicable penalty subsection. MCL 750.122(7)(b) plainly states that it applies only where the underlying offense is punishable by imprisonment for "more than 10 years" or "life or any term of years." The phrase "life or any term of years" is distinct from imprisonment terms up to a certain number of years. See *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007). The

underlying criminal offense in this case, assault with intent to do great bodily harm, is punishable by imprisonment for "not more than 10 years." MCL 750.84. Therefore, assault with intent to do great bodily harm cannot be considered an underlying offense for purposes of MCL 750.122(7)(b). To do so would be to impermissibly ignore the word "not" in the assault with intent to do great bodily harm penalty language. Because MCL 750.112(7)(a) provides for a lesser maximum penalty than subsection (7)(b), the information's reference to subsection (7)(b) as setting forth the applicable penalty provision was plain error.

Defendant asserts that the erroneous reference to subsection (7)(b) in the information entitles him to a new trial under MCL 750.122(7)(a). We disagree. Absent a timely objection and a showing of prejudice, a trial court may not reverse a conviction because of a defect, such as an incorrectly cited statute, in the information. MCR 6.112(G). Rather, even after trial, the court "may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." MCR 6.112(H). "The dispositive question in determining whether a defendant was prejudiced by a defect in the information is whether the defendant knew the acts for which he or she was being tried so that he or she could adequately put forth a defense." *Waclawski*, 286 Mich App at 706. Subsection (7) of the witness tampering statute only proscribes the penalty. Changing the statutory penalty citation does not affect the substantive elements of the crime for which defendant was required to defend. Further, with respect to penalty, defendant was sentenced consistent with the appropriate penalty provision in subsection (7)(a), not as prescribed in subsection (7)(b). Subsection (7)(b) prescribes a maximum sentence of ten years, but defendant received only a six-year maximum sentence for his witness tampering conviction. Although subsection (7)(a) prescribes a maximum sentence of four years, because defendant was sentenced as a fourth habitual offender, he could have received a maximum sentence of up to 15 years. MCL 769.12(1)(b). Regardless, because defendant received a maximum sentence of only six years, it is clear that the trial court was not misled by the erroneous citation to subsection (7)(b) in the information. Therefore, although the prosecutor technically violated MCR 6.112(D), which provides for an information's necessary content, the error was harmless.

IX. AMENDMENT OF INFORMATION

Next, defendant argues that the prosecutor and the trial court usurped the Legislature's authority when they amended the language in the witness tampering statute to fit defendant's conduct. We disagree.

The judicial branch does not have the authority to promulgate rules that infringe on the power of the executive branch to enforce the criminal law, or the power of the legislative branch to define the criminal law, including the penalties for various offenses. Const 1963, art 3, § 2, Const 1963, art 6, § 5; see also *People v Reichenbach*, 224 Mich App 186, 192; 568 NW2d 383 (1997).

Before trial, the prosecutor filed a motion to amend. However, he did not seek to amend the witness tampering statute, but rather to amend the information to allege that defendant violated MCL 750.122(1)(a), as well as MCL 750.122(1)(c) as the information charged. MCL 750.122(1) provides:

> A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:
>
> (a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) To influence any individual's testimony at a present or future official proceeding.
>
> (c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

Defendant stated that such an amendment would not prejudice the defense, which was the trial court's finding as well. Thus, the trial court allowed the amendment. Defendant's argument fails to recognize that the trial court's ruling pertained only to amending the information.

The amended information stated that defendant

> did give, offer to give, or promise $1,000 to an individual to discourage the individual from attending as a witness, testifying, or giving information at and/or encourage the individual to avoid legal process, to withhold testimony, or to testify falsely in a criminal case where the crime was punishable by a maximum term of imprisonment of more than 10 years, or imprisonment for life or any term of years.

The prosecutor also asked the trial court to edit the language in the information that it read to the jury by stopping after the phrase "criminal case." He wanted to eliminate the penalty language. The trial court agreed, acknowledging that it was not proper for a jury to consider penalty. Defendant is under the mistaken belief that this changed the substance of his charge. It only served to keep from the jury knowledge of defendant's potential penalty if convicted, which is not a matter for the jury to consider in deliberations. *People v Goad*, 421 Mich 20, 25-26; 364 NW2d 584 (1984) (jurors should only deliberate guilt or innocence, not speculate on punishment). Thus, the record does not support defendant's argument that the prosecutor and trial court colluded to substantively amend the witness tampering statute to fit defendant's conduct. Accordingly, defendant cannot establish plain error.

Affirmed, but remanded for recalculation of defendant's sentence. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ William C. Whitbeck
/s/ Donald S. Owens